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have been involved in these cases from their outset and am familiar with the documents produced in discovery by the parties and by third parties. I have also reviewed the opening and opposition papers submitted by all parties in connection with their summary judgment motions. The following facts are true of my personal knowledge and if called and sworn as a witness I could competently testify to them.

I. Selected Materials Regarding the Uploading of Content to YouTube by Viacom and Viacom's Agents.

2. Attached hereto as Exhibit 1 is a table that I prepared showing a small selection of the many videos uploaded to YouTube by Viacom employees, agents or others showing a variety of their attributes. The table also sets forth evidence demonstrating that the videos were uploaded with authorization from Viacom. These videos can be categorized as follows:

- (i) videos described as being part of a full episode of a television show;
- (ii) videos that bear "time codes" or markings designed to make them appear "roughed up;" and
- (iii) videos that appear to be clips excerpted directly from somewhere within a longer piece of content.

Exhibits 250A to 355B, referenced in the foregoing attached table, constitute the videos themselves. The "A" version is the original file format and the "B" version is a copy of the same file converted to the MPEG file format. The Version A files are "Flash" (or ".flv") video files, as stored on YouTube's servers, and were obtained directly from YouTube. (Similar references to video exhibits "A" and "B" in this declaration follow the same convention.) True and correct copies of the documents identified in the table, which show the authorized nature of these videos, are attached

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hereto as Exhibits 2 to 13, or were attached to my Opening Declaration or other papers submitted in conjunction with YouTube's summary judgment papers, and are so designated in the table.

3. Attached hereto as Exhibit 14 is a table showing that certain accounts used by Viacom's third party agents have uploaded over 5,954 videos to YouTube. I obtained the data reflected on that table by working with YouTube employees who collected it from YouTube's system. True and correct copies of the documents identified in the table are attached hereto as Exhibits 15 to 37, or were attached to my Opening Declaration or other papers submitted in conjunction with YouTube's summary judgment papers, and are so designated in the table.

II. Selected Documents Regarding YouTube Accounts Used by Viacom and Its Agents to Upload Content to YouTube.

4. Attached hereto as Exhibits 38 and 39, respectively, are two tables that I prepared showing a noncomprehensive selection of certain YouTube accounts used by Viacom or its agents to upload videos to YouTube. These accounts can be categorized as follows:

- (i) Accounts for which a review of the discovery produced in this action reveals no evidence that it was the subject of communications between Viacom and a YouTube employee in which Viacom's affiliation with the account was referenced. *See* Exhibit 38 attached hereto.
- (ii) Accounts for which Viacom contacted YouTube after having mistakenly taken down videos it had authorized to be uploaded to those accounts. *See* Exhibit 39 attached hereto.

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True and correct copies of the documents identified in these tables are either attached hereto as Exhibits 40 to 71, or were attached to my Opening Declaration or other papers submitted in conjunction with YouTube’s summary judgment papers, and are so designated in the table. Collectively, these accounts uploaded 2,445 videos to YouTube. I obtained this data by working with YouTube employees who collected it from YouTube’s system.

5. I have reviewed the Declaration of Scott B. Wilkens in Support of Viacom’s Opposition to Defendants’ Motion for Summary Judgment. In Paragraphs 18 to 19 that Declaration, Mr. Wilkens describes his attempt to estimate the number of videos uploaded by certain YouTube “director accounts and branded channels used by Viacom.” He represents that these accounts collectively uploaded 609 videos to YouTube by May 1, 2008. The users of those Viacom accounts continued to upload videos to YouTube even after May 1, 2008. Based on data I obtained by working with YouTube employees who collected it from YouTube’s system, the following table demonstrates the number of videos uploaded to the accounts identified by Viacom through the present day:

<i>Account Name</i>	<i>Total Videos Uploaded</i>
Paraccount	139
MTV2	11
mtv2allthatrocks	54
beheard	51
Spiketv	162
vh1staff	39
ParamountVantage	2
ParamountClassics	7
Bestweekever	158
theloveguru	33

strangewildernessuk	20
Total Videos Uploaded	676

6. Collectively, the accounts I described in Paragraphs 3 to 6 of this Declaration uploaded 7,254 videos to YouTube.

7. Additionally, certain of the “director accounts and branded channels used by Viacom” identified by Mr. Wilkens in his declaration were subject to takedown requests from Viacom. I described certain documents reflecting examples of this in my Opening Declaration at Exhibits 54-55 (SpikeTV), 56-57 (Paraccount).

III. Comparison of Data Associated with Certain Clips in Suit and Certain Clips Viacom Withdrew from Suit.

8. I have reviewed the Declaration of Scott B. Wilkens in Support of Viacom’s Opposition to Defendants’ Motion for Summary Judgment. Paragraph 2 of that declaration includes a table containing details regarding 20 Clips in Suit. Attached as Exhibit 79 is a table repeating the data included in Paragraph 2 of Mr. Wilkens’s Declaration, but adding metadata from YouTube’s system regarding those videos, such as the video title, and the username and email address of uploader of the video. That additional data was produced to Plaintiffs. Attached hereto as Exhibit 80 is a table containing the same categories of data for an additional 20 YouTube clips, all of which were dismissed from this suit by Viacom. *See* Rubin Opening Declaration ¶ 12 & Ex. 122. Versions A and B of the videos referenced in Exhibit 80 are attached hereto ranging from Exhibits 250A to 355B.

IV. Comparison of Video Clips Viacom Has Withdrawn from the Case to Those that Remain Clips In Suit.

9. As I described in my Opening Declaration, on February 26, 2010, Viacom dismissed with prejudice its infringement claims as to 434 clips it had previously asserted as clips in suit. *See* Rubin Opening Declaration ¶ 12 & Ex. 122.

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10. I reviewed the clips over which Viacom has withdrawn its infringement claims, and compared them to certain clips over which Viacom continues to assert an infringement claim. Based on my analysis, I prepared a table identifying a selection of Clips in Suit that I observed to be either identical or effectively indistinguishable from those clips over which Viacom has dismissed its infringement claims. The following table shows a selection of 21 such Clips in Suit.

<i>Work in Suit</i>	<i>Dismissed Clip (Video ID)</i>	<i>Located at Ex.</i>	<i>Clip in Suit (Video ID)</i>	<i>Located at Ex.</i>	<i>Nature of Similarity</i>
Drillbit Taylor	5kWtyVo-8k0	269A/B	05-rpbKib-c	255A/B	Identical
Drillbit Taylor	5kWtyVo-8k0	269A/B	28xcyE87EWM	260A/B	Indistinguishable in kind and format
Drillbit Taylor	sxNuomEUGG0	335A/B	2dZ66NoxefY	261A/B	Identical
Drillbit Taylor	sxNuomEUGG0	335A/B	2x1i2SCkRh0	262A/B	Indistinguishable in kind and format
Drillbit Taylor	AgGf_xso0HI	279A/B	a4nSnBS-Yno	274A/B	Identical
The Heartbreak Kid	g5ce_rOoGcc	297A/B	SHWyzGNIIQ	333A/B	Identical
The Heartbreak Kid	g5ce_rOoGcc	297A/B	jgg9pIPqcuk	308A/B	Indistinguishable in kind and format
The Heartbreak Kid	g5ce_rOoGcc	297A/B	z0d_wjgerjM	354A/B	Indistinguishable in kind and format
Hot Rod	6xFe570faSI	271A/B	_zPnAMSizOI	254A/B	Indistinguishable in kind and format
Hot Rod	6xFe570faSI	271A/B	4ImcoZoPHdY	267A/B	Indistinguishable in kind and format
Iron Man	DUTtBxd2KPQ	291A/B	7FZx2Ykf0l0	272A/B	Identical

<i>Work in Suit</i>	<i>Dismissed Clip (Video ID)</i>	<i>Located at Ex.</i>	<i>Clip in Suit (Video ID)</i>	<i>Located at Ex.</i>	<i>Nature of Similarity</i>
Jamie Kennedy's Blowin Up (101)	k6CSyIS5528	311A/B	zdvpptWbSv4	355A/B	Identical
Jamie Kennedy's Blowin Up (103)	88XvlfKnGwI	273A/B	rjQ3idh6Whk	331A/B	Identical
Sweeney Todd	Gy3TrIlnTvA	299A/B	_HdZSFiXfDs	252A/B	Identical
The Andy Milonakis Show	_sTgT76i3vc	253A/B	LNKunwTCtH A	316A/B	Indistinguishable in kind and format
Transformers	gxjpdGjv59o	298A/B	4j3nWwCY4N Q	268A/B	Identical
Transformers	hfPAw9MM69A	300A/B	rSVdjKXmVDo	332A/B	Identical
Transformers	hfPAw9MM69A	300A/B	i6nh-vJl3n0	304A/B	Identical
Transformers	xWCkluxpGW8	351A/B	ijN91rPxcMo	305A/B	Indistinguishable in kind and format
Transformers	j4A-BqFSSL8	306A/B	JF5XI1hJ_30	307A/B	Indistinguishable in kind and format
Transformers	1168T5BsmVY	258A/B	1JqB_xvmWXw	259A/B	Indistinguishable in kind and format

Attached hereto as Exhibit 81 is an expanded version of this table, which also includes the usernames of the users who uploaded the identified videos.

V. Viacom's Continuing Assertion of Infringement Claims Regarding Clips It Uploaded to YouTube.

11. In Viacom's most recent iteration of its infringement claims (its October 15, 2009 "Amended Production of Works in Suit," as modified by its February 26, 2010 Request for Dismissal), Viacom continues to assert infringement claims against YouTube for the videos set forth in the following table. The table also contains

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excerpts of data produced by YouTube in response to Plaintiffs' discovery requests that shows the uploader's YouTube username, email address provided at registration, user-supplied video title, and user-supplied video description information for these Clips in Suit:

<i>Video Id</i>	<i>Username</i>	<i>Email</i>	<i>Title</i>	<i>Description</i>
SPEexW7gXMw	fcreetus		Jamie Kennedy on Sunset Blvd. in a Marble bag!	Clip of Jamie Kennedy from his Blowin Up show, running across Sunset Blvd. in Hollywood wearing nothing but a marble bag...yikes!
W4UW2CBWrO4	MissTilaTequila		TILA TEQUILA ON THE SHOWBIZ SHOW WITH DAVID SPADE	Here I am with ma man David Spade! Awesome!
jlwMQBzfm4	BrokenBridgesMovie		"Broken" by Lindsey Haun from Broken Bridges movie	DVD AVAILABLE IN STORES JANUARY 9TH! This is the official music video for "Broken" by Lindsey Haun. It appears on the Broken Bridges soundtrack. For more info, click here - http://pushplayer.com/brokenbridgesmo...

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cGrnebuquSk	NateDernComedy		Rob Riggle iPhone, with Nate Dern and other TDS interns	From the June 28, 2007 Daily Show with Jon Stewart, this is a very funny piece done by Rob Riggle on the iPhone. You can see me and some of the other TDS interns spattered throughout the vid. I'm the bearded on playing Jenga. http://natedern.com
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VI. Viacom’s Use of YouTube’s CVP Tool Through its Agent BayTSP Starting in 2006.

12. The following table lists accounts that Viacom’s agent BayTSP created and uses in connection with YouTube’s Content Verification Program (“CVP”). It appears that the account naming convention employed is generally to spell the Viacom’s division name backwards and to insert the number “1” between the letters. For example, the account for Viacom’s BET division is “t1e1b.”

<i>Account Creation Date</i>	<i>Viacom Entity</i>	<i>CVP Account Name</i>	<i>Evidence of Creation Date & Connection to Viacom/BayTSP</i>
Apr. 17, 2006	BET	t1e1b	Rubin Reply Exs. 82, 83
Jun. 21, 2006	Paramount	rapyab	Rubin Reply Ex. 84
Sep. 8, 2006	MTVN	v1t2m	Rubin Reply Ex. 83, 85
Sep. 8, 2006	Viacom	mocalilv	Rubin Reply Ex. 83, 85

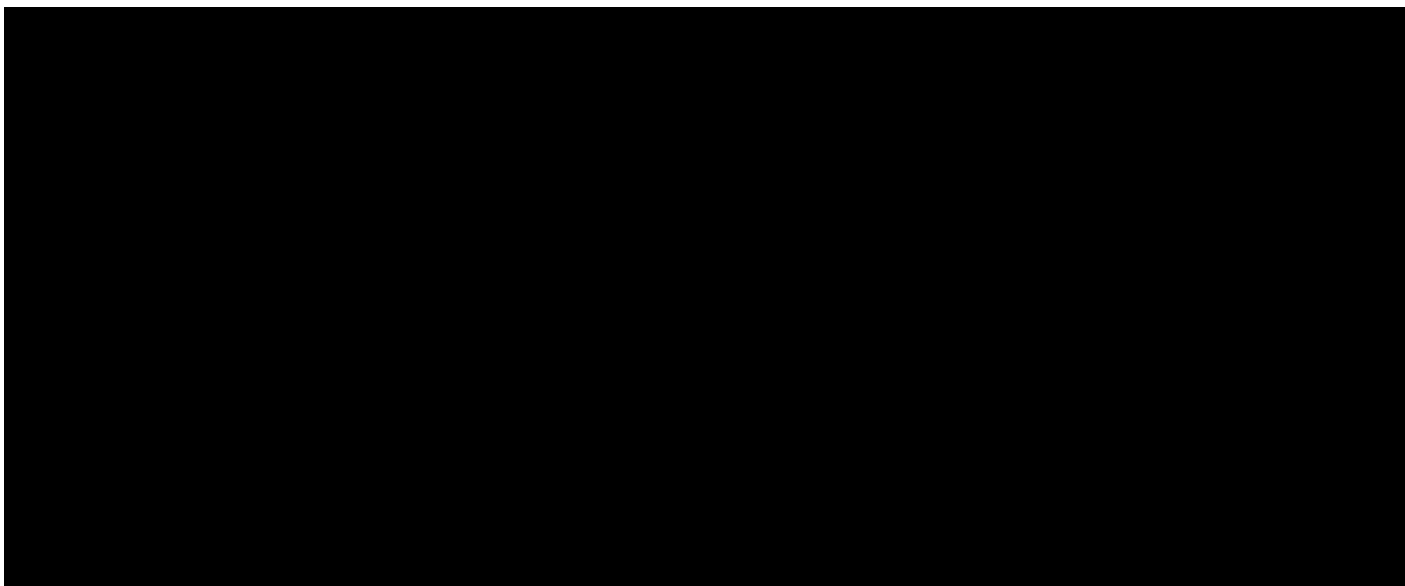
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Sep. 13, 2006	Atom Entertainment	moltla	Rubin Reply Ex. 83, 86
Oct. 9, 2006	Spike	ekilpls	Rubin Reply Ex. 87, 88
Oct. 9, 2006	Comedy Central	ydemlolc	Rubin Reply Ex. 87, 88
Oct. 9, 2006	Country Music Television	tlmlc	Rubin Reply Ex. 87, 88

The documents referenced in the foregoing table are attached hereto as Exhibits 82 to 88.¹

VII. Logging Database Data.

13. In consultation with plaintiffs, YouTube produced certain non-anonymized data from its Logging Database for certain agreed-upon YouTube accounts that are associated with the parties' employees and/or agents. That produced data bears Bates numbers GOO DB DATA 024-25.



¹ Exhibits 89 to 160 intentionally left blank.

VIII. Removals of Certain Videos from YouTube.

15. On October 3, 2006, YouTube proactively removed the video referenced in Hohengarten Exhibit 32 (LPQRtuvuYAU) when enforcing its repeat infringer policy. On March 7, 2007, a YouTube user uploaded the video clip referenced in Hohengarten Ex. 73 (Tht2iCpQ0J0). YouTube removed the video on March 9, 2007 in response to a DMCA takedown notice. On May 21, 2008, YouTube proactively removed the video referenced in Hohengarten Exhibit 77 (NpqqWW0Z7vM) when enforcing its repeat infringer policy. I obtained the foregoing data by working with YouTube employees who collected it from YouTube's system.

IX. Discovery in these Actions.

a. Limited Party Document Discovery.

16. Discovery in these actions did not proceed strictly according to the Federal Rules of Civil Procedure. The parties entered in stipulated agreements that altered certain aspects of the standard rules. In one significant departure, the parties agreed that they would not be obligated to search the files of all employees likely to have responsive information. Rather, the parties negotiated and agreed upon a "Custodian Agreement" whereby only the files of certain designated employees, or "custodians," would be searched. In the *Premier League* Action, counsel for the

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Premier League Plaintiffs made an initial selection, which was later supplemented by additional custodians selected by YouTube. In the *Viacom* Action, both the initial and all subsequent sets of custodians were selected by the opposing sides. In addition to the production of documents from the files of designated custodians and various individuals falling into special categories, the parties also agreed to produce documents from noncustodial sources in accordance with the Federal Rules.

17. In total, 100 custodians were effectively identified from the Viacom plaintiffs. Of those, only 15 were employees in one of Viacom's many marketing departments.

18. The parties also stipulated that party documents postdating January 1, 2008 would not be produced except in agreed-upon circumstances.

19. As a result of these agreements, YouTube did not receive a comprehensive document production from the expansive set of marketing departments at Viacom's various subsidiaries.

b. YouTube's Limited Ability to Take Discovery of Viacom's Third Party Marketers.

20. YouTube was unable to issue subpoenas to or depose every one of Viacom's numerous third party marketers. Nor does YouTube believe it is aware of all of Viacom's marketing agents, as Viacom never identified them. Viacom did not include any third party marketing agents in its initial disclosures. Attached hereto as Exhibit 161 is a true and correct copy of Viacom's initial disclosures. Viacom also limited its answer to YouTube's Interrogatory No. 9 (asking Viacom to identify "each individual who has knowledge of marketing or public relations efforts for Your content involving uploading video of such content to websites for online viewing, including without limitation each individual involved in uploading or authorization

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for uploading of all videos that Viacom directly or indirectly caused to be uploaded to YouTube”) to Viacom employees, thereby excluding all third parties from its response. Attached hereto as Exhibits 162 and 163 are true and correct copies of Viacom’s initial and supplemental responses to YouTube’s Interrogatory No. 9.

c. Viacom’s Deficient Interrogatory Responses.

21. Viacom’s Response to YouTube’s Interrogatory No. 9 was also deficient by its own self-imposed limitations. On September 8, 2008, Viacom identified 59 Viacom employees who it represented were “most knowledgeable about Viacom’s uploading of content on websites for marketing and public relations purposes.” At the time, Viacom promised to supplement its response “in due course.” *See* Exhibit 162 (Viacom’s Responses to YouTube’s Second Set of Interrogatories). One-and-a-half years later, on January 8, 2010, Viacom’s supplemental response to Interrogatory No. 9 identified another 31 Viacom employees “who are knowledgeable about Viacom’s uploading of content on websites for marketing and public relations purposes.” *See* Exhibit 163 (Viacom’s Amended and Supplemental Responses to YouTube’s Second Set of Interrogatories).

22. Viacom’s supplemental response to Interrogatory No. 9 was served on YouTube after the close of document discovery, and a few days prior to the end of fact depositions, but after all such depositions had been scheduled. Nonetheless, that response was still deficient because it fails to identify at least the following Viacom employees who, as revealed during YouTube’s depositions of Viacom personnel, also play a role in marketing Viacom’s content: Joe Armenia, Nicole Browning, Erica Cantwell, Kat Cheng, Michelle Clark, David Cohen, Megan Crowell, Robb Dickehut, Eric Flannigan, Michelle Ganeless, Kristina Griswold, Carolyn Hu, Pete Jacobs,

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Kevin Kay, Jeffery Keaton, Scott Lapatine, Kevin Mackall, Duncan McDonald, Dee McLoughlin, Sonia Ocasio, Wendy Perez, Phil Pirrello, Lisa Preston, Peter Rosati, Deena Stern, Julie Sun, Benjamin Taylor, Joseph Ternesky, David Toth, Bryan Warman, Lauren Weinstein, and Jolena Wong. Attached hereto as Exhibits 164 (36:8-38:23), 165 (21:6-22:3), 166 (9:23-11:6), 167 (85:10-18), 168 (10:21-24, 11:17-18, 14:2-18, 103:2-104:16), 169 (55:16-58:21), 170 (82:21-84:11, 88:8-90:3), 171 (8:14-21, 9:19-10:7, 166:5-17), 172 (13:16-14:12, 34:16-37:8), 173, 174 (35:2-37:13), 175 (55:15-57:9), 176 (71:10-72:3), and 177 (33:17-34:7), are true and correct excerpts from the depositions of Viacom employees identifying themselves or their co-workers as being familiar with Viacom's marketing practices. The timing of Viacom's supplemental response also prevented YouTube from deposing any of the newly revealed marketing personnel.

23. YouTube also served its Interrogatory No. 23 on Viacom asking it to "[i]dentify each Work In Suit uploaded in whole or in part to the YouTube website by Viacom or with Viacom's authorization and the date of each such authorized upload." Viacom initially refused to provide an answer to this Interrogatory, claiming no clips from the Works in Suit had been uploaded to YouTube with Viacom's authorization, and asserted that the information sought was not relevant. Attached hereto as Exhibit 178 is a true and correct copy of Viacom's initial answer to Interrogatory No. 23. After meeting and conferring with YouTube, Viacom agreed to provide a complete response. Despite that, Viacom only provided a limited and incomplete answer to Interrogatory No. 23. Viacom limited its answer to information it found in its own document production, which was limited to the custodians and time period explained in Paragraphs 18 to 21. Viacom excluded from its answer any documents from

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YouTube's production or any of the third party productions. Viacom also did not seek information that existed outside that limited set of its own documents. Attached hereto as Exhibit 179 is a true and correct copy of Viacom's supplemental response to Interrogatory No. 23. Even by its own measure, Viacom has been unable to provide a complete response. My review of the documents Viacom identified from its own production reveals Viacom failed to include numerous documents that evidence the authorized uploading of clips from Works in Suit by Viacom to YouTube that it did not identify in its interrogatory response. Attached hereto as Exhibits 37, 44, and 180 to 186 are examples of additional documents, produced by Viacom, that demonstrate that Viacom's answer to Interrogatory No. 23 is incomplete.

d. Limited and Deficient Deposition Testimony.

24. As with document discovery, the parties agreed that certain limitations would be placed on the cumulative number of hours each side could depose witnesses from the opposing party. Accordingly, YouTube was limited in its ability to depose the large number of Viacom employees who were involved in Viacom's marketing efforts.

25. Ultimately, YouTube was able to depose roughly 20 current or former Viacom employees who were familiar with Viacom's online marketing practices. As I mentioned in Paragraph 21, however, between its two responses to YouTube's Interrogatory No. 9, Viacom identified 90 employees who are knowledgeable about Viacom's uploading of content on websites for marketing and public relations purposes. And Viacom's list omitted at least, an additional 32 employees with marketing knowledge, some of whom are included in the 20 current or former employees that YouTube was able to depose despite Viacom's omission (Nicole

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Browning, Eric Flannigan, and Michelle Ganeless). Of those Viacom employees who had knowledge of Viacom's marketing practices that YouTube deposed, only four appear in Viacom's initial answer to Interrogatory No. 9 (Kyle Bonici, Steve Farrell, Amy Powell, Tamar Teifeld).

26. Of the 20 marketing witnesses that YouTube was able to depose, including many who Viacom identified as having knowledge of its online marketing practices in its interrogatory response, numerous witnesses refused to provide answers to basic questions regarding those practices. Attached hereto are excerpts from the deposition transcripts of Todd Apmann (Ex. 164: 18:19-30:20, 34:23-35:2, 98:3-100:15), Damon Burrell (*see* Schapiro Opp. Ex. 259), Kyle Bonici (Ex. 187: 20:14-22:19, 33:14-34:20, 35:10-14, 38:13-40:4, 43:14-22, 46:12-25, 50:25-51:22), Steve Farrell (Ex. 169: 46:20-48:14), Amy Powell (Ex. 174: 38:6-24, 40:15-42:24, 50:15-51:11, 91:13-95:1), Tamar Teifeld (Ex. 175: 164:21-165:3, 171:10-19, 175:21-176:13), and Megan Wahtera (Ex. 177: 27:20-29:13, 34:14-38:17, 39:24-41:11, 61:25-63:20, 72:17-73:15).

X. Viacom's Resistance to Production of "whitelists".

27. On January 19, 2010, after the close of document discovery, I wrote to Viacom after learning of its failure to produce the aggregate data it allegedly maintained regarding the uploading of promotional videos by its many agents and subsidiaries. The existence of this data was not revealed until the last deposition taken in the case and after the close of document discovery, despite being called for by YouTube's discovery requests. A true and correct copy of my January 19, 2010 letter to Viacom is attached hereto as Exhibit 188.

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28. Viacom responded by producing one such list of authorized accounts on January 25, 2010. Attached hereto as Exhibit 189 is a true and correct copy of Viacom's response and the attached list. That list, however, did not appear complete, and I wrote back to Viacom the next day, January 26, 2010, to request the complete list of authorized accounts and urls described by Viacom's witness. Attached hereto as Exhibit 190 is a true and correct copy of YouTube's January 26, 2010 response to Viacom. On January 29, 2010, Viacom wrote back claiming that no other responsive lists existed. Attached hereto as Exhibit 191 is a true and correct copy of Viacom's January 29 letter. I then spoke with counsel for Viacom questioning the veracity of the claims in their letter. Then, on February 9, 2010, Viacom agreed to produce additional documents containing lists of accounts Viacom wished to protect from takedown requests from its agents, which were referred to by Viacom and in my Opening Declaration as "whitelists." Attached hereto as Exhibit 192 is a true and correct copy of Viacom's correspondence regarding these additional lists, and the lists themselves.

29. In providing these whitelists to YouTube, Viacom marked them "Highly Confidential," which means that no one at YouTube is entitled to see them (outside of a narrow set of attorneys pursuant to a stipulation executed in connection with summary judgment briefing). Attached hereto as Exhibit 193² is a true and correct copy of a communication with Viacom's counsel in which he confirmed that Viacom did not want the information about its "whitelisted" accounts shared with YouTube's employees as recently as January of this year.

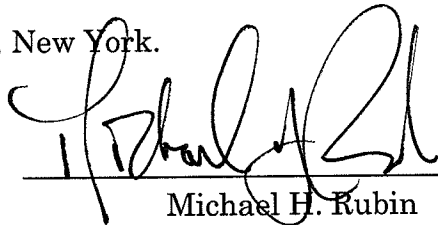
² Exhibits 194 to 249 intentionally left blank.

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XI. Viacom's Acknowledged Failure to Preserve Relevant YouTube-related Marketing Documents.

30. Viacom acknowledges that it failed to preserve YouTube-related marketing documents after it sued YouTube. As a result, tens of thousands of such documents unavailable to YouTube. For example, on May 8, 2009, Viacom's counsel Susan Kohlmann confirmed to me that Viacom had failed to preserve the documents of Paramount marketing employee Kristina Tipton when she left Viacom in September 2007, six months after Viacom sued YouTube. Attached hereto at Exhibit 72 is a copy of Ms. Kohlmann's letter to me. Ms. Tipton testified at her deposition that she was heavily involved with Paramount's YouTube-related marketing activities, and that she had tens of thousands of emails in her email outbox when she left Viacom. Viacom only produced 6 custodial documents from Ms. Tipton's files. See Schapiro Opp. Decl. Exs. 378, 379.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration is executed the 4th day of June 2010, at New York City, New York.



Michael H. Rubin